Supreme Court, U. S.
FILED
AUG 27 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-54

CITY OF LOS ANGELES, *et al.*,

Petitioners,

vs.

FANCHON BLAKE, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief of the Personnel Testing Council of Southern California as Amicus Curiae.

TYRE & KAMINS,
PETER M. SLOAN,
1800 Century Park East, Suite 1000,
Los Angeles, Calif. 90067,
(213) 553-6822 & 879-2177,
Attorneys for the Personnel Testing Council of Southern California as Amicus Curiae.

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THE PERSONNEL TESTING COUNCIL OF SOUTHERN CALIFORNIA, AS AMICUS CURIAE.

This brief of the Personnel Testing Council is filed pursuant to Rule 42(1) of the Rules of the Supreme Court.

Interest of Amicus Curiae.

The Personnel Testing Council of Southern California is one of the oldest organizations in the United States devoted to personnel testing and selection. Membership consists of personnel and industrial psychologists, per-

sonnel specialists and other professionals interested in advocating the use of fair and non-discriminatory employment practices. The Personnel Testing Council of Southern California files this brief out of the concern that vital matters affecting employee aptitude testing and personnel selection are at issue.

Introduction and Summary of Argument.

The Ninth Circuit Court of Appeals' decision in *Blake v. City of Los Angeles* would create widespread confusion in the personnel testing community because it: (1) creates an unreasonable standard for test validation, and (2) effectively prevents testing for the best qualified job applicant.

To rebut a *prima facie* showing of discrimination in a testing case, the Ninth Circuit would require an employer to establish that a selection procedure is "intimately related" to "safe and efficient job performance."

This standard is both too stringent and too lax. First, the standard is too stringent because a selection device that is demonstrably a reasonable measure of the job would be insufficient to establish that a selection device is job-related under the Ninth Circuit's "intimately related" test. This conflicts with the holding of this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) that a test must be a "reasonable" measure of job performance. Amicus urges that validation evidence should be treated like any other evidence. *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 344 (1977). Where the trier of the fact is convinced that the selection procedure more likely than not is a reasonable measure of the job, the test should be considered valid and job-related.

Second, the Ninth Circuit's standard is too lax because it limits test validation to safe and efficient job performance. This prohibits an employer from selecting an employee on the basis of *excellent* job performance. A police officer is a prime example of a job where selection of the best qualified candidate is a necessity. Furthermore, lowering selection standards to only safe and efficient job performance would conflict with civil service laws which presume selection of the best candidate. It would also preclude a private employer from exercising the necessary flexibility to operate its business at maximum capability.

ARGUMENT.

A. Employers Should Be Permitted to Validate Selection Devices by a Demonstrably Reasonable Measure of the Job.

The Ninth Circuit's decision fundamentally misconstrues a footnote from *Dothard v. Rawlinson*, 433 U.S. 321 (1977), and elevates "business necessity" beyond demonstrable "job-relatedness." The court in *Blake* stated:

> "It is not enough that the device selects characteristics that may have some rational relationship to job performance; the discriminatory employment practice must be shown to be necessary to a safe and efficient job performance to survive a Title VII challenge. *Dothard v. Rawlinson*, 433 U.S. 332 n. 14."

The Ninth Circuit interprets this to mean that a validation defense is "very narrow." (Appendix A, Petitioner's Writ of Certiorari, p. 17, hereinafter referred to as "App. A.") The Ninth Circuit would require that a selection device be "intimately related" to the job. (App. A, p. 28) This directly conflicts with *Griggs*, which held that if a selection device has a discriminatory effect, the employer is then required to prove that the test is "demonstrably a *reasonable measure* of job performance." *Griggs v. Duke Power Co., supra* at 424.

The "intimately related" standard also conflicts with *United States v. State of South Carolina*, 445 F.Supp. 1094, 1115 (DSC 1976), affirmed 434 U.S. 1026 (1978):

> "We think that Griggs did *not* import into Title VII law the concept of 'compelling interest' developed as a part of the 'strict scrutiny' standard for assessing certain classifications under the Fourteenth Amendment. Under this concept, the Court would balance disparate impact on blacks against the business purpose of the employer and uphold the business practice only if it were sufficiently 'compelling' to overcome the disparate impact." (Emphasis added)

Thus, a "compelling interest", "strict scrutiny" or "intimately related" standard should not be applied in judging the validity of a test. This is only reasonable in view of the purpose of testing.

A test is useful to an employer to the extent that it is able to predict that those applicants who do better on a test will perform relatively better on the job. See, *e.g.*, E. McCormick and J. Tiffin, *Industrial Psychology* 98 (6th Ed. 1974). A testing device is thus relative by its very nature: the better the test, the better it is able to distinguish the less qualified from the more qualified applicant. The extent to which a test is capable of predicting the success of employees on the job is the test's "validity."

A validation study of test validity is, therefore, like any other evidence: its persuasiveness depends "upon all the surrounding circumstances." *International Brotherhood of Teamsters v. United States, supra* at 340. Any rational evidence that tends to show that a selection process is job related should, therefore, be considered and weighed by the trial court.

Furthermore, any one alleged shortcoming under the EEOC Selection Guidelines, 29 C.F.R. §1607 *et seq.*, should not require that a test meet higher standards than are set by the guidelines themselves. Amicus submits that the EEOC Selection Guidelines should be

considered only as guidelines and not minimum requirements as the Ninth Circuit implies.

The Ninth Circuit decision itself demonstrates the importance of the trial court weighing all of the surrounding circumstances and alleged shortcomings under the EEOC Selection Guidelines. The Court criticizes the Los Angeles Police Department's validation study because it does not include persons under the minimum height requirement. The Court states that there may be circumstances in which it would be advantageous for a police officer to be short because the police officer could then look underneath objects (App. A, p. 22 note 7). Without passing final judgment on the persuasiveness of their particular argument, Amicus contends that a trial court could possibly find that this alleged evidentiary shortcoming would not be fatal to a validity study, which otherwise demonstrates that height is a reasonable measure of job performance for a police officer.

B. Employers Should Be Able to Test for the Best Possible Candidate.

The Ninth Circuit's decision also limits a validation study to establishing job characteristics that are "necessary to safe and efficient job performance." (App. A, pp. 19-20). According to the Ninth Circuit this means a test could not be validated to permit selection of the best possible candidate. This is in direct contradiction with this Court's holding in *Griggs* that Title VII ". . . expressly protects the employer's right to insist that any prospective applicant, negro or white, *must meet the applicable qualifications*", citing a memorandum of Senators Case of New Jersey and Clark

of Pennsylvania, managers of the bill on the Senate floor. *Griggs v. Duke Power Co., supra* at 434.

The Ninth Circuit's decision would also play havoc with virtually every civil service system because civil service laws often require that the best possible candidate be selected:

> "Civil service laws, like civil rights laws, were enacted to ameliorate a social evil. In the former case, it was the spoils system; in the latter, discrimination. To the citizens of the State of New York, civil service was sufficiently important that they mandated its use by their constitution. In so doing, they 'declared in unmistakable terms that merit, ascertained as therein provided, shall govern appointments and promotions in the public service', and that merit must be ascertained as far as practicable by competitive examination." *Kirkland v. New York Services*, 520 F.2d 420, 428 (2d Cir. 1975).

Therefore, Amicus submits that the "safe and efficient" standard set by the Court in *Blake* be rejected, and that testing be permitted to select the best possible job applicant.

Conclusion.

In *Sweeney v. New Hampshire State College*, ... U.S. ....., 58 L.Ed.2d 216 (1978), this Court clarified the burden of proof in an individual disparate treatment case, which was originally enunciated in *McDonell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Amicus submits that *Blake* clearly calls for a similar clarification in a testing case. This Court has never required that testing be limited to establishing safe

and efficient job performance. Nor has this Court ever required that a test be "intimately related" to job performance where a test can be shown to be demonstrably a reasonable measure of the job. Accordingly, Amicus respectfully requests that the Court grant certiorari to ensure that testing be permitted where it can be shown to be demonstrably a reasonable measure of the job.

Dated: August 24, 1979.

Respectfully submitted,

TYRE & KAMINS,
PETER M. SLOAN,
By PETER M. SLOAN,

Attorneys for the Personnel Testing Council of Southern California as Amicus Curiae.